Nos. 93-356, 93-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Respondent.

UNITED STATES OF AMERICA and
THE FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Respondent.

Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AT&T'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the D.C. Circuit correctly applied the controlling decisions which hold that the Federal Communications Commission has no authority to "remove" the provisions of 47 U.S.C. § 203 that require that all common carriers shall file their rates with the Commission and charge only the filed rate.

STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. AT&T Capital Corporation (and its subsidiary AT&T Credit Corporation) and NCR Corporation are subsidiaries of AT&T having outstanding debt in the hands of the public.

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AT&T'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners the Federal Communications Commission ("FCC") and MCI seek review of an unpublished order of the D.C. Circuit that does not conflict with any decisions of this Court or of any court of appeals. To the contrary, that order was required by the plain language of the statute it applied, by a long line of this Court's decisions culminating in *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and by prior court of appeals' decisions. These decisions hold that the FCC and other regulatory agencies cannot relieve any common carriers from their statutory obligation to charge only "filed rates," regardless of whether the carriers possess "market power." *Compare* FCC Pet. i.

1. Section 203 of the Communications Act of 1934, 47 U.S.C. § 203, sets forth for telecommunications common carriers what has come to be known as the "filed rate" doctrine. That doctrine "prohibits a[ny] regulated entity from charging rates 'other than those properly filed with the appropriate federal regulatory authority.'" *Consolidated Edison Co.* v. *FERC*, 958 F.2d 429, 431 n.2, 432 (D.C. Cir. 1992) (citations omitted).

Sections 203(a) and 203(c) prescribe complementary obligations and prohibitions. Section 203(a) establishes the mandatory ratefiling obligations:

> Every common carrier . . . *shall* . . . file with the Commission and . . . keep open for public inspection schedules showing *all* charges for itself . . . and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(a) (emphasis added). Section 203(c) establishes the counterpart prohibitions against the provision of service at any rate other than that filed:

> [*N*]*o* carrier shall (1) charge, demand, collect, or receive *a greater or less or different compensation for* such communication, or for any service in connection therewith, between the points named in any such schedule *than the charges specified* in the schedule then in effect, or (2) *refund or remit* by any means or device *any portion of the charges so specified*, or (3) extend to any person any privileges or facilities in such communication, or employ or *enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.*

47 U.S.C. § 203(c) (emphasis added).

2. In the early 1980s, the FCC initiated a proceeding —known as *Competitive Carrier*—in which it addressed the scope of Section 203. In successive Reports in that proceeding, the FCC adopted a series of rules reducing the tariff-filing obligations of what it termed "non-dominant carriers," including virtually all of the competitors of respondent American Telephone and Telegraph Co. ("AT&T"). In particular, the FCC determined in its *Fourth Report* to "forbear" from "applying" to AT&T's competitors, including MCI, the ratefiling requirements of Section 203. The FCC acknowledged that the filing of rates was "a" congressionally selected "means for the Commission to ensure the Act's objective of reasonable and not unjustly discriminatory rates." But the Commission concluded that, because of intervening events that Congress could not have foreseen, the "fundamental goals" of the Act would better be served by this new "forbearance" policy.[1]

In 1984, the FCC decided in its *Sixth Report* not only to "forbear" from "applying" the ratefiling requirement to non-dominant carriers, but affirmatively to prohibit such filings.[2] MCI petitioned for review of that rule. It contended that the *Sixth Report* was "in direct violation of Section 203 of the Communications Act, which provides that *every* common carrier *shall* file tariffs with the Commission."[3]

The D.C. Circuit agreed and vacated the *Sixth Report*. In an opinion written by now-Justice Ginsburg, the D.C. Circuit held that Section 203's requirements that "every" common carrier "shall" file its rates, 47 U.S.C. § 203(a), and that "no" common carrier "shall" charge any rates other than those so filed, 47 U.S.C. § 203(c), impose mandatory obligations on common carriers that the

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[1] *See Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report & Order, 91 F.C.C.2d 59, 70-71 (1982) (*"Second Report"*); *id.*, Fourth Report & Order, 95 F.C.C.2d 554 (1983) (*"Fourth Report"*).

[2] *See id.*, Sixth Report & Order, 99 F.C.C.2d 1020 (1985) (*"Sixth Report"*).

[3] *MCI Telecommunications Corp.* v. *FCC*, No. 85-1030 (D.C. Cir.), Br. of MCI, p. 10 (Apr. 1, 1985) (emphasis in original).

agency has no power to waive under Section 203(b) of the Act or otherwise. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). This opinion is reproduced in the Appendix to this Opposition. Resp. App. 1a-20a.

The FCC argued in that appeal that its power to "modify" the requirements of Section 203 in "particular instances" or "special circumstances" under Section 203 (b)(2), 47 U.S.C. § 203(b)(2), permitted it to "exempt" carriers from the statutory ratefiling requirements. The court rejected that assertion. *Id.* at 1191-92; Resp. App. 11a. It noted that the FCC's position was inconsistent not only with the plain language of the statute, but also with decisions of the Court of Appeals for the Second Circuit, *id.* at 1192 (Resp. App. 11a-12a) (citing *AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978), and *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973)), and, until very recently, with decisions of the FCC itself. *Id.* at 1192-93 (Resp. App. 13a-14a) (citing *Western Union Tel. Co.*, 75 F.C.C.2d 461, 474 (1980)). Finally, the court stated that, in light of its holding vacating the *Sixth Report*, the FCC's earlier "forbearance" order could continue to stand, if at all, only as an exercise of the agency's enforcement discretion rather than as a rule that purported to exempt any carriers from the statutory ratefiling obligation. *Id.* at 1190-91 n.4 (Resp. App. 8a n.4).

3. Notwithstanding this 1985 decision of the D.C. Circuit, MCI began in mid-1987 to violate Section 203 by refusing to file rates for many of its services. When it learned of this practice, AT&T filed a complaint with the FCC under Section 208 of the Act, 47 U.S.C. § 208, challenging MCI's violation of its statutory obligations. AT&T explained that this conduct enabled MCI to obtain a substantial and unlawful competitive advantage: it could match or undercut AT&T's published rates, while AT&T was "unable to match [its] competitors' unknown prices." *Regular Common Carrier Conference* v. *United States*,

793 F.2d 376, 379 (D.C. Cir. 1986). AT&T sought a cease and desist order to bring MCI into compliance with the law, and damages for the competitive injuries caused by MCI's violations.

Ten months after AT&T's complaint had been filed (during which time the FCC took no action to resolve it), this Court decided *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and eliminated any possibility that the FCC might have the authority that MCI claimed. The Court in *Maislin* construed the statutory filing requirements of the Interstate Commerce Act that are the model for Section 203. *Maislin* held that these requirements bind all carriers; that the provision of services at secret, unfiled rates constitutes the unlawful price discrimination that these ratefiling requirements were designed to prevent; and that the Interstate Commerce Commission could not authorize the provision of services at rates lower than the filed rates. *Id.* at 130-35.

The FCC was statutorily required to resolve AT&T's complaint within a year of the complaint's filing. 47 U.S.C. § 208(b)(1). When two and a half years had passed with no agency action, AT&T filed a petition for mandamus with the court of appeals asking the court to direct the FCC to act. The FCC responded by representing that it would rule on AT&T's complaint within 30 days.[4] Based on that representation, the court denied the petition.[5]

4. Approximately 30 days later, the FCC issued its decision denying and dismissing AT&T's complaint. MCI Pet. 57a. That decision stated, for the first time since *MCI* v. *FCC* was decided seven years earlier, that the FCC's forbearance policy was not, after all, "merely an exercise of the Commission's prosecutorial discretion."

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[4] *In re AT&T*, No. 91-1487 (D.C. Cir.), Response of FCC to AT&T's Petition for a Writ of Mandamus (Dec. 18, 1991).

[5] Order, *In re AT&T*, No. 91-1487 (D.C. Cir. Jan. 24, 1992).

Rather, the Commission announced, it was a "binding substantive rule" that purported to have "removed" the ratefiling requirement. MCI Pet. 64a.

The FCC nevertheless "declined to decide forthrightly" whether such a rule could be lawful in light of *Maislin* and *MCI* v. *FCC*. MCI Pet. 43a. The FCC instead dismissed AT&T's request for a cease and desist order on the ground that it intended to reexamine the lawfulness of its forbearance policy in a future rulemaking. MCI Pet. 64a-66a. And it denied AT&T's request for damages on the ground that it would be "unfair" to find MCI liable for its statutory violations when MCI had acted consistently with the FCC's policy. MCI Pet. 63a-64a. Thus, the FCC purported to authorize MCI to continue to violate Section 203, with immunity from damages, at least until the FCC completed a new rulemaking. *See* MCI Pet. 51a.

AT&T petitioned for review, and the court of appeals granted its petition. The court had "little difficulty in concluding" that the FCC's action was arbitrary and capricious and unlawful. MCI Pet. 48a. It held that the FCC had a statutory obligation under Sections 206-208 of the Communications Act, 47 U.S.C. §§ 206-208, to adjudicate complaints "under the law currently applicable," and that the FCC had failed to do so. MCI Pet. 45a. The court attributed the FCC's "troubling tactics" to an "obvious strategy" of trying to "keep the [forbearance] rule in effect as long as possible despite serious doubt that the rule could not withstand judicial review." MCI Pet. 48a-49a. It then held, in reliance on *MCI* v. *FCC* and *Maislin*, that the rule was "plainly contrary to Section 203." MCI Pet. 39a. The Court observed that the FCC "will have to obtain congressional sanction for its desired policy course." MCI Pet. 54a.

5. Approximately two weeks after the court of appeals issued *AT&T* v. *FCC*, the FCC released its Report and Order in the rulemaking proceeding. MCI Pet. 3a ("*Rule-*

making Order").[6] The FCC reiterated its position that Section 203(b) granted it authority to remove the statutory ratefiling requirement. MCI Pet. 12a-20a. It also concluded that Congress had "acquiesced" in this interpretation by failing to enact legislation disapproving it. MCI Pet. 22a-25a.

AT&T petitioned for review. In the unpublished order that is the subject of the petitions for certiorari, the Court of Appeals granted AT&T's petition and summarily reversed the *Rulemaking Order*. It held that "[t]he merits of the parties' positions are so clear as to warrant summary action" and that "[t]he decision of this court in *American Tel. & Tel. Co.* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992) conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." MCI Pet. 1a-2a.

REASONS FOR DENYING THE WRIT

The D.C. Circuit's unpublished order does not present any question that warrants review by this Court. It reaffirms and applies the many decisions setting forth the longstanding "filed rate" doctrine and holding that the ratefiling requirements of the Communications Act are mandatory and that only Congress, and not the FCC, can remove them for any carrier, regardless of whether it possesses "market power." That holding is required by the statute's plain language, is compelled by this Court's decision three years ago in *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and is consistent with every other court of appeals' decision to address the issue.

Nor does this case present any issue that merits review concerning the appropriate degree of deference to be af-

[6] The FCC's practice is frequently to adopt an order on one date, and then release that order on a later date. The *Rulemaking Order* was adopted one week before the D.C. Circuit's decision in *AT&T* v. *FCC* issued.

forded to agency interpretations of statutes. Here, as elsewhere, the D.C. Circuit applied the standards of *Chevron* and its many progeny. The D.C. Circuit has rejected the FCC's interpretation of the Communications Act on the ground that it is contrary to the statute's unambiguous language and to the long line of decisions of this Court and other courts that had rejected identical such agency claims.

In fact, the FCC's petition reveals that its real quarrel is not with the D.C. Circuit's decision, but with the filed rate requirement of the Communications Act. If the FCC believes that these requirements are outdated and administratively burdensome (FCC Pet. 15-18), the appropriate remedy is not to ask this Court to overrule a long line of settled precedent construing the filed rate requirements of the Communications Act. Rather, its remedy lies with Congress. Congress has adopted several recent amendments to the ratefiling provisions of the Act, and is fully capable of assessing the FCC's arguments for regulatory change. Alternatively, the FCC may explore other measures of reducing regulatory burdens—as the FCC has done in a recent order that it adopted in response to the D.C. Circuit's decision. These other options underscore that the D.C. Circuit's unpublished decision does not raise any matter of national importance warranting this Court's review and that the petitions are, at best, premature.

I. CONSISTENT WITH EVERY OTHER FEDERAL COURT DECISION ON THE SUBJECT, THE D.C. CIRCUIT CORRECTLY REAFFIRMED THE FILED RATE DOCTRINE IN HOLDING THAT THE FCC LACKS AUTHORITY TO REMOVE THE RATEFILING REQUIREMENT OF SECTION 203.

The court of appeals' holding that the statutory ratefiling requirement is mandatory, and cannot be removed by the FCC, is correct and presents no conflict with any decision of this Court or any other court. To the contrary, it is consistent with every decision addressing the issue.

This Court's 1990 decision in *Maislin* considered at length the question of the power of an administrative agency (there the ICC) to use its discretionary powers to modify the strictures of the filed rate doctrine for carriers (there truckers) who operate in competitive markets and lack market power.[7] The Communications Act embodies filed rate, non-discrimination, and agency modification provisions that were taken directly from the provisions of the Interstate Commerce Act ("ICA").[8] Indeed, the ratefiling requirements in the two statutes are worded indistinguishably.[9]

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[7] This ruling in *Maislin* was in turn reaffirmed by this Court in *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993).

[8] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective"); *see also* 73 Cong. Rec. 10313 (1934) (statement of Rep. Rayburn) (ICA Section 6 as basis of Communications Act Section 203); 73 Cong. Rec. 8823 (1934) (statement of Sen. Dill). *See generally American Broadcasting Cos.* v. *FCC*, 643 F.2d 818, 820-21 (D.C. Cir. 1980); *AT&T* v. *FCC*, 487 F.2d 865, 879 (2d Cir. 1973).

[9] *Compare* 47 U.S.C. § 203(a) (Communications Act tariff filing requirement) *with* 49 U.S.C. § 6(1) (original ICA tariff filing requirement) *and* 49 U.S.C. § 10762(a) (recodified ICA tariff filing requirement). *Compare* 47 U.S.C. § 203(b)(2) (Communications Act authorization for particular agency modification of requirements) *with* 49 U.S.C. § 6(3) (original ICA agency authorization provision) *and* 49 U.S.C. § 10762(d)(1) (recodified ICA agency authorization provision). *Compare* 47 U.S.C. § 203(c) (first clause, Communications Act prohibition of service in absence of filed rates) *with* 49 U.S.C. § 6(7) (original ICA prohibition against service without filing rates) *and* 49 U.S.C. § 10761(a) (recodified ICA prohibition against service without filing rates). *Compare* 47 U.S.C. § 203(c) (second clause, Communications Act prohibi-

Based on this extensive examination, *Maislin* concluded that none of the broad delegations of agency power in the ICA empowered the ICC to permit provision of service at unfiled rates. The Court gave two related reasons in support of that conclusion.

First, even if individual provisions of the ICA could be read, in isolation, as authorizing the Commission to "sanction[] adherence to unfiled rates," such a policy determination would "undermine[] the basic structure of the Act." 497 U.S. at 132. The Court reasoned that charging secret unfiled rates that are below the filed rate is a *per se* violation of the ICA counterparts to Section 202(a) as well as Section 203 of the Communications Act and that "[c]ompliance with [the ratefiling requirements] is 'utterly central' to the administration of the Act." *Id.* (quoting *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986) (Scalia, J.)). Without adhering to the ratefiling requirement, the Court explained:

> The ICC cannot review in advance the reasonableness of *unfiled* rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC.

497 U.S. at 132-33 (emphasis in original). Accordingly, the Court held that the ICC's facially broad power to proscribe "unreasonable practices" could not be used to undermine the filed rate requirement.

The FCC's attempt to use its "modification" authority of Section 203(b) to excuse compliance with statutory ratefiling requirements is, if anything, in even greater tension with the basic design of the Act. The FCC's position would allow every common carrier in the industry (except

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tion of rebates or service at other than filed rates) *with* 49 U.S.C. § 6(7) (original ICA anti-rebate provision) *and* 49 U.S.C. § 10761 (recodified ICA anti-rebate provision).

AT&T and local exchange carriers) to offer service at unfiled rates. Thus, even if the scope of the modification power were ambiguous (which, as we show below, it is not), *Maislin* establishes that it cannot be construed as authorizing the agency to abrogate the filed rate doctrine, for that would be contrary to the core structure of the Act.

Second, the Court found that the ICC's interpretations of its unreasonable practices authority were inconsistent with countless decisions of this Court requiring strict adherence to the filed rate doctrine, notwithstanding its "harsh effects." 497 U.S. at 128 (citing *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Southern Pac. Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 343-44 (1982); *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Louisville & N. R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924)).[10] "For a century," the Court explained, it had repeatedly interpreted the statute's tariff filing and non-discrimination provisions as barring carriers' provision of service at unfiled rates. *Maislin*, 497 U.S. at 130. Given this extensive authority, the agency could not depart from this interpretation. *Id.* at 130-36. The Court also specifically rejected the agency's assertion that increased competition justified allowing carriers to charge unfiled rates: "exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements." *Id.* at 135. Indeed, because the case involved bankrupt truckers who manifestly had no market power, *Maislin* establishes that the filed rate requirements are mandatory for all carriers and that the presence or absence of market power is irrelevant.

MCI seeks to avoid the clear holding of *Maislin* by asserting that the FCC's modification power under Section

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[10] *See also Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Texas & Pac. Ry.* v. *Mugg*, 202 U.S. 242 (1906); *Gulf, C. & S.F. Ry.* v. *Hefley & Lewis*, 158 U.S. 98 (1895).

203(b) exceeds the ICC's power under 49 U.S.C. § 10762(d)(1). MCI points out that the latter provision is located in the same section of the ICA as the provision requiring carriers to file tariffs, 49 U.S.C. § 10762(a)(1) (which is parallel to Section 203(a) of the Communications Act), but is in a different section of the ICA from the provision requiring carriers to provide service only at tariffed rates, 49 U.S.C. § 10761(a)(1) (which is parallel to Section 203(c)). Thus, MCI argues, the ICC is authorized only to modify the parallel provision to Section 203(a), while the FCC may modify either Section 203(a) or 203(c).

MCI's argument is baseless for several reasons. First, even if there were other differences between the FCC's and ICC's powers, what is at issue here is the power of the FCC to modify the ratefiling requirement of Section *203(a)*, and MCI's own argument establishes that the D.C. Circuit correctly held that the FCC, like the ICC, has no authority to waive *this* requirement. It is thus irrelevant whether the ICC lacks power to modify the ICA provision parallel to Section 203(c).

Second, the ICC's modification power is *not* less than the FCC's. Prior to the recodification of the ICA in 1978, all of the relevant ICA provisions, including the tariffing, modification, and filed-rate provisions, were contained in Section 6 of the ICA. *See* former 49 U.S.C. §§ 6(1), 6(3), 6(7). Further, former Section 6 of the ICA was the model for Section 203 of the Communications Act. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934); 73 Cong. Rec. 10313 (1934) (statement of Rep. Rayburn); *AT&T* v. *FCC*, 487 F.2d 865, 879 (2d Cir. 1973); p. 9 n.8, *supra*. Thus, prior to recodification, the ICC had the same modification power as the FCC. And when the ICA was recodified, Congress explicitly enacted a provision of positive law that states that the recodification "may not be construed as making a substantive change in the laws replaced." Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466.

In any event, it is well established that the filed rate doctrine applies not only under the ICA, but also under other federal regulatory statutes that contain ratefiling requirements patterned after the ICA. Thus, the filed rate doctrine has been repeatedly applied under the Federal Power Act and the Natural Gas Act.[11] And this Court has specifically recognized that the doctrine applies under the Communications Act.[12]

The FCC (Pet. 13) attempts to distinguish *Maislin* on its facts by claiming that it addressed only "[t]he question of Commission authority to authorize deviation from a rate that has been filed." But this completely ignores the Court's reliance on the importance of the ratefiling requirement to the structure of the Act, and on the unbroken chain of authority on which the Court relied, dating back nearly 100 years. Based upon these considerations, *Maislin* held that the requirement that carriers charge only filed rates is essential to the Act's nondiscrimination and other requirements, concluded that no deference is due contrary agency determinations, and rejected an agency's avoidance of the filed rate doctrine based upon appeals to policy, to competition, and to subsequent congressional ratification. *See* pp. 5, 10-12, *supra*. The FCC fails to acknowledge that, for *all* of

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[11] *See Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981); *Montana-Dakota Utils Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951).

[12] *See Ambassador, Inc.* v. *United States*, 325 U.S. 317, 323 (1945) (observing that all communications rates, charges, practices, classifications, and regulations "must be filed with the Commission in the form it prescribes, may not be changed except after due notice, and must be observed in the conduct of the business by the company" (citing 47 U.S.C. § 203(a), (b), (c))); *see also Western Union Tel. Co.* v. *Priester*, 276 U.S. 252 (1928); *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566 (1921) (recognizing doctrine under provisions of ICA governing telegraph companies and later incorporated into Communications Act).

these reasons, *Maislin* supports the court of appeals' determination and is directly contrary to the FCC's petition.

Nor is there any conflict among the courts of appeals on this issue. Those courts have uniformly construed the filed rate requirements and Section 203(b) of the Communications Act as not empowering the FCC to allow carriers to offer services at unfiled rates. Like the D.C. Circuit, the Second Circuit has surveyed the text and legislative history of Section 203(b) (which it noted was derived directly from the Interstate Commerce Act) and concluded that "under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty days notice provision." *AT&T* v. *FCC*, 487 F.2d at 879; *see also AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978) (setting forth Section 203(a)'s tariff filing requirement and stating that "[w]e are aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met").

Indeed, until very recently this was the FCC's understanding as well. Shortly after the FCC initiated its *Competitive Carrier* proceeding, it stated that there was "no question" that tariffs are "essential to the entire administrative scheme of the Act." *Western Union Tel. Co.*, 75 F.C.C.2d 461, 474 (1979). The FCC explained that "[t]he importance of tariffs and the requirement that common carriers—*all common carriers*—must offer all of their communications services to the public through published tariffs is well established." *Id.* (emphasis added). Moreover, that was the position the FCC argued to the Second Circuit, when it explained that "[t]he Commission has affirmative commands from Congress to ensure . . . that rates and practices are set forth in tariffs filed with the FCC," and that "[t]he agency has no authority to ignore these commands, even if market forces arguably are present which undercut the 'natural monopoly' justification for regulation." *AT&T* v. *FCC*, 572 F.2d 17 (2d Cir. 1978), Brief of FCC, pp. 49-50 (quoted in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985) (Resp. App. 14a)).

The courts of appeals' uniform interpretation, and the FCC's previous interpretation, of Section 203(b) are compelled by the plain meaning of Section 203. First, Section 203(b) authorizes the FCC only to "modify," rather than to eliminate or abandon, the tariff filing requirement at the heart of the Act. As the court of appeals explained, Section 203(b) must be given this limited construction because "modify" in this context is "defined as '[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce.'" *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985) (Ruth Bader Ginsburg, J.) (quoting *Black's Law Dictionary* 95 (5th ed. 1979)) (Resp. App. 11a).

Second and more fundamentally, the FCC's power to modify is limited to "particular instances" or "special circumstances or conditions." 47 U.S.C. § 203(b)(2). MCI cites such language in the *ICA* as evidence that the *ICC*'s authority is limited,[13] while conspicuously omitting to mention that identical limitations apply to the FCC's Section 203(b) power. *See* MCI Pet. 21-22 (partially quoting 47 U.S.C. § 203(b)). Section 203(b), in fact, also authorizes the FCC to make modifications only "in particular instances or by general order applicable to special circumstances or conditions," 47 U.S.C. § 203(b), which, as MCI concedes for indistinguishable language in the ICA, substantially constrains an agency in precisely the manner the D.C. Circuit found. The FCC's forbearance policy, in contrast, makes avoidance of the tariff filing requirement the general rule applicable to hundreds of carriers, and

[13] *See* MCI Pet. 21 (quoting 49 U.S.C. § 10762(d)(1), limiting ICC modification power to "change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances").

leaves the Act's central filing requirements applicable only to relatively few, including AT&T.

Section 203(c) confirms that the FCC's modification power does not extend to allowing carriers to offer services at unfiled rates. The first clause of Section 203(b) requires that tariffs be filed in accordance with provisions governing their form and content, "unless otherwise provided by or under authority of this Act." MCI relies on this clause to argue that the FCC has sweeping authority under Section 203(b) to eliminate the requirements of Sections 203(a) and 203(c). MCI Pet. 18. But MCI completely fails to mention Section 203(c)'s second clause, which prohibits charging rates other than those filed in tariffs. This clause is unqualified and not similarly subject to the FCC's modification power.[14]

In addition, both the FCC (Pet. 13) and MCI (Pet. 18) omit the remaining language of even the first clause of Section 203(c), thus creating the erroneous impression that the initial clause addresses the core tariff filing requirement. That additional language indicates that carriers may be relieved from filing schedules "in accordance with the provisions of this Act and with the regulations made thereunder." 47 U.S.C. § 203(c). Even viewed in isolation, this clause supports an FCC modification authority that extends only to additional requirements of the Act (beyond the core filing requirements preserved in the remainder of Section 203(c)) and to the FCC regulations detailing the content and form of tariff schedules, how they must be displayed and transmitted, and similar details.

[14] In any event, the reference in the first clause of Section 203(c) to exceptions "otherwise provided by or under authority of this Act" does not suggest that the FCC has an otherwise unstated authority to waive Section 203. That clause refers to other provisions of the Act that provide for limited and explicit statutory exceptions to the filing requirements. *See* 47 U.S.C. § 211(b) (expressly authorizing the FCC to "exempt" carriers from submitting copies of "minor contracts"); 47 U.S.C. § 203(a) (tariff filing requirement not applicable to "connecting carriers").

Finally, the FCC and MCI argue that Congress, through the Telephone Operator Consumer Services Improvement Act (TOCSIA) (codified at 47 U.S.C. § 226), "acquiesced in the permissive detariffing rule." MCI Pet. 19; *see id.* 22a; FCC Pet. 15. This argument is insubstantial.[15] "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947). Here, the statute—Section 203—is unambiguous, and Congress cannot silently "acquiesce" in an interpretation contrary to the statute's plain meaning. *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992) ("administrative interpretation followed by congressional reenactment cannot overcome the plain language of a statute"); *accord Arkansas Best Corp.* v. *Commissioner*, 485 U.S. 212, 222 n.7 (1988); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978); *TVA* v. *Hill*, 437 U.S. 153, 173 (1978).

Beyond that, Congress' recent grant to the FCC of statutory authority to limit the filing requirements only for commercial mobile carriers, *see* 47 U.S.C. § 332(c)(1)(A), confirms both that Congress does not rely upon "acquiescence" when it wishes to grant the FCC the powers that petitioners seek and that Congress hardly assumes that the FCC already possesses such powers. In any event, TOCSIA specifically disclaims any such intent or effect. It was enacted to address widespread complaints associated with a narrow segment of the industry—operator service providers. TOCSIA specifically provides—in a provision entitled "[s]tatutory construction" that neither the FCC nor MCI even mentions—that "[n]othing in this

[15] The claim by the FCC (Pet. 14) that "the D.C. Circuit has never considered" this Congressional acquiescence argument is false. In *AT&T* v. *FCC*, the FCC fully briefed the argument based on TOCSIA (although it declined formally to endorse the argument prior to the conclusion of its rulemaking), and AT&T in reply responded to it. *See AT&T* v. *FCC*, No. 92-1053 (D.C. Cir.), FCC Br. 20-21; *id.*, AT&T Br. 26.

section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this Act." 47 U.S.C. § 226(i). Because Section 203 is one of the "other sections of this Act," TOCSIA cannot be read to alter the historic understanding of that section's mandatory ratefiling requirements.[16]

II. THIS CASE PRESENTS NO ISSUE INVOLVING DEFERENCE TO AGENCY DETERMINATIONS UNDER *CHEVRON* OR OTHERWISE.

There is also no merit to petitioners' claims that this case presents an important question of what deference is due an agency's interpretation of the statute that governs it. *See* FCC Pet. 10-14; MCI Pet. 13-16. Here, as elsewhere, the D.C. Circuit has applied the principles established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny and precursors.

Chevron holds that courts are to reverse agency interpretations of a statute where they are contrary to the statute's unambiguous terms or to any reasonable interpretations of them. 467 U.S. at 842-43. In *Maislin*, moreover, the Court further held that "[o]nce we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). This Court recently reaffirmed this holding,

[16] Contrary to the FCC's *Rulemaking Order*, MCI Pet. 24a, TOCSIA's requirement that operator service providers file "informational tariff[s]" does not become "mere surplusage" if Section 203 is given effect. Section 203 applies only to "common carriers." TOCSIA's tariffing requirement applies more broadly to non-common carriers as well. 47 U.S.C. § 226(a)(9). Those informational tariffs, moreover, are required to contain substantial data that Section 203 does not require be filed, such as amounts of commissions and estimates of traffic volume. 47 U.S.C. § 226(h)(1)(A).

stating that judicial construction of a statute binds subsequent courts and eliminates "any issue of deference to the [agency]." *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847 (1992).

These are the principles that the D.C. Circuit applied in the unpublished, summary decision that is the subject of the petitions. It vacated the FCC's order on the ground that the earlier decision in *AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992), "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." MCI Pet. 2a. That earlier decision (*see* MCI Pet. 37a), in turn, relied on the still earlier decision in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985), where the D.C. Circuit (in the opinion by now-Justice Ginsburg appended to this opposition) rejected the FCC's interpretation on the ground that it "departs from any plausible reading of the statute's text." 765 F.2d at 1193 (Resp. App. 14a). As the D.C. Circuit made explicit, this was a determination that "the language of the statute was not susceptible to the Commission's reading" and that the interpretation is entitled to no deference and must be set aside under *Chevron*. MCI Pet. 52a;[17] *see Chevron*, 467 U.S. at 842-43.

In short, the D.C. Circuit's prior decisions on this issue applied accepted principles of administrative law in rejecting the FCC's interpretation of Section 203. In all events, the unpublished decision that is the subject of the petitions properly followed the prior decisions of that Court and this Court. Indeed, given the authoritative deci-

[17] The D.C. Circuit specifically noted in *AT&T* v. *FCC* that although *MCI* v. *FCC* does not "cite" *Chevron*, it "postdates" that decision (MCI Pet. 52a n.11), and the holding that the FCC's position "departs from any plausible reading of the statute's text" constituted the determination required by *Chevron*. *MCI* v. *FCC*, 765 F.2d at 1193 (Resp. App. 14a); *compare Chevron*, 467 U.S. at 842-43.

sions of this Court in *Maislin* and of the D.C. Circuit and the Second Circuit, the doctrine of *stare decisis* independently barred the D.C. Circuit from deferring to the FCC's contrary interpretation of Section 203, and establishes that there is no possible issue under *Chevron*. *See Maislin*, 497 U.S. at 131; *Lechmere*, 112 S. Ct. at 847.

Finally, the FCC and MCI stretch the boundaries of plausible argument in suggesting that the D.C. Circuit requires a lesson in applying *Chevron*. *Chevron* is the daily basis of much of the D.C. Circuit's work,[18] and neither the FCC nor MCI points to any D.C. Circuit cases or doctrines that diverge from the appropriate deference mandated by *Chevron*. This case presents no significant issue regarding the appropriate scope of deference to agency determinations, under *Chevron* or otherwise.

III. THE AVAILABLE LEGISLATIVE REMEDY AND THE FCC'S RECENT *RANGE TARIFF ORDER* INDEPENDENTLY ESTABLISH THAT THE PETITIONS RAISE NO ISSUE OF NATIONAL IMPORTANCE AND THAT THE PETITIONS ARE, AT BEST, PREMATURE.

The FCC's petition and especially its emphasis upon "the anti-competitive effects of tariffs" (FCC Pet. 15-18 & n.*) confirm that petitioners' quarrel is with the Communications Act as currently in force rather than with the unpublished decision of the D.C. Circuit. Even if the FCC's assessment of the competitive effects of the filed rate doctrine were correct, the proper course would be to have the Communications Act amended or those effects ameliorated, rather than requesting this Court to overrule a century of established doctrine setting forth the scope and effect of the filed rate doctrine.

[18] *See generally* Schuck & Elliot, *To The* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984 (documenting increased deference to agency decisions by D.C. Circuit after *Chevron*).

Congress is entirely capable of assessing the FCC's claims that the Communications Act's tariffing requirements are outdated. In TOCSIA, Congress recently and specifically addressed the tariffing requirements applicable to a newly regulated set of telecommunications providers, and emphasized that nothing in the amendments affected Section 203(a)'s requirements. *See* 47 U.S.C. §§ 226(a)(9), 226(i); p. 18 n.16, *supra*. In the most recent Budget Act, Congress provided the FCC with the authority to relieve a small subset of carriers (commercial mobile service providers) of tariff filing obligations. *See* 47 U.S.C. § 332(c)(1)(A). Yet, here, the FCC has improperly turned to the courts for still broader relief, contrary to this Court's clear admonition that "[i]f there is to be an overruling of the [filed rate doctrine], it must come from Congress, rather than from this Court." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

Finally, even if the case were otherwise certworthy—as it is not—the petitions are premature. Under any view, the FCC possesses latitude under Section 203(b) to ameliorate adverse effects of the filed rate doctrine. The FCC's recent Memorandum Opinion and Order in *Tariff Filing Requirements for Nondominant Common Carriers*, CC Docket No. 93-36 (Aug. 18, 1993) ("*Range Tariff Order*"), accomplishes this goal in certain respects by continuing to excuse nondominant carriers from cost support requirements and by also modifying the form of and notice requirements for their tariff filings. These constitute the "streamlined procedures" that Section 203(b) authorizes the FCC to adopt. *See* FCC Pet. 18-19 n.*; p. 14, *supra*.

In addition, contrary to the FCC's misstatement (Pet. 18-19 n.*), the *Range Tariff Order* also purports substantively to relax the filing requirements of Section 203 for non-dominant carriers by permitting them to file tariffs *without* specifying the rates they actually charge. Instead,

under the terms of this *Range Tariff Order*, such carriers may satisfy their obligations under Section 203 by filing mere ranges of possible rates, as long as all of the rates they actually charge fall somewhere within those ranges. Like the earlier forbearance policy, the FCC rested this purported authorization of range filings on the ground that it would eliminate adverse effects of the filed rate requirement and undue burdens on certain carriers.

The *Range Tariff Order* demonstrates that the issue raised by the petitions is at best premature. In a pending review proceeding in the D.C. Circuit, AT&T has claimed that this "range tariff" aspect of the *Range Tariff Order* is the practical equivalent of the earlier "forbearance" rule and is unlawful for the same reason. By contrast, the FCC has argued that the earlier decisions are distinguishable and that the *Range Tariff Order* can be upheld under the law of the D.C. Circuit. If the FCC were to prevail on those claims, then the question whether it has the authority completely to dispose of the tariffing requirement, as it attempted to do here, will be of no moment. If the FCC does not prevail, then there will be time enough for the Court to consider whether that decision warrants further review. In short, even if the issues raised in the petitions were otherwise worthy of review (as they are not), the petitions are at best premature.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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November 3, 1993

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 85-1030

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

LEXITEL CORPORATION, AMERICAN SATELLITE COMPANY, TELTEC SAVING COMMUNICATIONS CO., MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., ET AL., COMPETITIVE TELECOMMUNICATION ASSOCIATION, UTILITIES TELECOMMUNICATION COUNCIL, THE WESTERN UNION TELEGRAPH CO., GTE SPRINT COMUNICATIONS CORPORATION, NETWORK I, INC., INTERNATIONAL BUSINESS MACHINES CORPORATION, AERONAUTICAL RADIO, INC., TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, BELL TELEPHONE COMPANY OF PENNSYLVANIA, ET AL., RCA AMERICOM COMMUNICATIONS, INC., SOUTHERN SATELLITE SYSTEMS, INC., SATELLITE BUSINESS SYSTEMS, AD HOC TELECOMMUNICATIONS USERS COMMITTEE, RAINBOW SATELLITE, INC.,
Intervenors.

Petition for Review of an Order of the
Federal Communications Commission

Argued June 3, 1985

Decided July 9, 1985

As Amended July 9, 1985

Before TAMM, MIKVA and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

Petitioner MCI Telecommunications Corporation (MCI) challenges a Federal Communications Commission (FCC or Commission) directive, captioned the *Sixth Report and Order*, issued in the Commission's long-evolving *Competitive Carrier* rulemaking.[1] The *Sixth Report* (1) requires all non-dominant common carriers of interstate telephone service, including MCI, to cancel their tariffs on file with the Commission within six months of the effective date of the order; and (2) declares that

[1] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor: Sixth Report and Order*, 57 RAD.REG.2d (P & F) 1391 (1985) (*Sixth Report*). *Competitive Carrier* rulemaking orders prior to the *Sixth Report* were: *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979) (*Notice*); *First Report and Order*, 85 F.C.C.2d 1 (1980) (*First Report*); *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981) (*Further Notice*); *Second Report and Order*, 91 F.C.C.2d 59 (1982) (*Second Report*), *reconsideration denied*, 93 F.C.C.2d 54 (1983); *Further Notice of Proposed Rulemaking*, 47 Fed.Reg. 17,308 (1982); *Third Further Notice of Proposed Rulemaking*, 48 Fed.Reg. 28,292 (1983); *Third Report and Order*, 48 Fed.Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) (*Fourth Report*); *Fourth Further Notice of Proposed Rulemaking*, 49 Fed.Reg. 11,856 (1984) (*Fourth Further Notice*); *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984) (*Fifth Report*).

the Commission will not accept tariff filings from the non-dominant carriers in the future. MCI moved for a stay of the *Sixth Report*; on April 11, 1985, this court granted the motion and ordered expedited briefing and oral argument. *MCI Telecommunications Corp. v. FCC*, No. 85-1030 (D.C. Cir. Apr. 11, 1985).

The parties tender three issues for review: (1) whether MCI's challenge is timely; (2) whether the Commission has statutory authority to *prohibit* common carriers from filing tariffs; and (3) whether, assuming the Commission's authority, the *Sixth Report* was arbitrary and capricious. We conclude that MCI's petition for review is timely and that the Commission lacks authority to prohibit MCI and similarly situated common carriers from filing tariffs that, by statute, *every* common carrier *shall* file. *See* Communications Act of 1934 (Communications Act), § 203(a), 47 U.S.C. § 203(a) (1982). We therefore vacate the *Sixth Report* and remand this matter to the Commission for further consideration. In view of our conclusion that the FCC's order exceeds the agency's statutory authority, we do not reach the question whether the *Sixth Report* was arbitrary and capricious.

I. BACKGROUND

A. *Regulatory Proceedings*

In 1979, the FCC commenced its *Competitive Carrier* rulemaking, a proceeding shaped with a view toward gradual deregulation of the non-dominant common carrier interstate telephone industry. The Commission's initial *Notice* observed that non-dominant companies—those lacking market power—had no ability to charge supra-competitive rates or to engage in predatory pricing. *Notice*, 77 F.C.C.2d at 334. The FCC sought comments on a broad range of options, and its *First Report*, issued in 1980, announced streamlined regulations for non-

dominant common carriers. *First Report*, 85 F.C.C.2d at 30-49.[2]

In its 1981 *Further Notice*, the Commission focused on whether to undertake "definitional" or "forbearance" deregulation. The definitional approach entailed classifying certain non-dominant carriers of communication services as noncommon carriers. Because Title II of the Communications Act, 47 U.S.C. §§ 201-224 (1982), applies only to common carriers, this approach would have exempted non-dominant carriers from all Title II regulation. *See Further Notice*, 84 F.C.C.2d at 463-70. The forebearance approach involved abstaining from applying to non-dominant carriers certain Title II procedural requirements while maintaining the basic substantive requirements that carriers charge "just and reasonable" rates and not engage in "unreasonable discrimination." 47 U.S.C. §§ 201-202 (1982); *see Further Notice*, 84 F.C.C.2d at 471-91.

In its *Second Report*, released in 1982, the Commission adopted a forbearance position, *Second Report*, 91 F.C.C.2d at 61-62, which *permitted* resellers of basic services who owned no transmission facilities to cancel tariffs filed with the Commission and to convert to service on a private contract basis. *Id.* at 73. In subsequent 1983 and 1984 orders, the Commission extended permissive forbearance first to specialized common carriers (including MCI) and all resellers, *Fourth Report*, 95 F.C.C.2d at 557, and later to domestic satellite carriers providing domestic interstate service, miscellaneous common carriers, carriers providing domestic, interstate, and interexchange digital transmission networks, and affiliates of exchange carriers providing interstate interexchange services. *Fifth Report*, 98 F.C.C.2d at 1209-10.

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[2] Under the streamlined regulations, non-dominant carrier rates were presumed lawful, *First Report*, 85 F.C.C.2d at 33, and new rates could be filed on 14-day (rather than the previously required 90-day) notice. *Id.* at 37.

B. *Sixth Report*

The *Sixth Report*, target of MCI's petition for review, changed the permissive forbearance arrangement to a mandatory one. Under the previous orders, "forborne" carriers could elect to continue offering service pursuant to filed tariffs, or to cancel their filed tariffs and convert to private contracts. Many new entrants apparently chose not to file tariffs, but the vast majority of existing foreborne carriers opted to maintain their services under the tariff system. The Commission's *Fourth Further Notice* requested comment on whether forborne carriers should be required to cancel their tariffs and convert to a carrier-customer individual contract system. *Fourth Further Notice*, 49 Fed.Reg. at 11,857.

In the *Sixth Report* the Commission replied to the comments of numerous parties. The principal arguments confronting the FCC were these: (1) the Commission lacks authority to abolish tariffs, *Sixth Report*, 50 RAD. REG.2d at 1393; (2) the abolition of tariffs would eliminate the repository of information consumers need to detect discriminatory practices, *id.* at 1394; (3) conversion to private contracts would impose an excessive burden on carriers,, *id.* at 1394-95; and (4) there are less drastic alternatives, *id.* at 1395-96.

The Commission responded first that it found in section 203(b)(2) of the Communications Act, 47 U.S.C. § 203(b)(2) (1982), "express authority to exempt carriers from tariff filing requirements where appropriate." *Sixth Report*, 57 RAD.REG.2d at 1398. Consumers would benefit in several ways, the Commission reported. Dropping tariff filings would eliminate delay and opportunities for collusive pricing tactics. Furthermore, the absence of filed tariffs could be expected to stimulate the development of customer-specific and innovative service offerings. *Id.* at 1399-400. The Commission acknowledged that carriers "might perceive some increased administrative burdens, at least initially," *id.* at 1400, but it considered

this prospect outweighed by the positive features of de-tariffing non-dominant carriers. Sufficient information would be available to consumers, the FCC said, because carriers seeking to preserve their competitive position "will make their rates and other information, formerly contained in tariffs, available to the public." *Id.* at 1401. For these reasons, the Commission declared that forborne carriers henceforth would be prohibited from filing tariffs and that forborne carriers with tariffs on file would be required to abolish those tariffs and convert to private contracts within six months. *See id.* at 1393.

On January 11, 1985, MCI petitioned for review.[3] We stayed the challenged Commission action and have considered this case on an expedited basis. *See supra* p. 1. In the discussion that follows, we explain why MCI's petition is timely and why, in obedience to the basic statutory command at stake, we vacate the *Sixth Report*.

II. Discussion

A. *Timeliness*

The *Sixth Report* was published in the *Federal Register* on January 10, 1985, and MCI filed its petition for review on January 11, 1985, at the very start of the sixty-day period for review petitions. *See* 47 U.S.C. § 402(a) (1982). The Commission concedes that MCI can challenge the *Sixth Report*, but argues that MCI cannot reach beneath the surface of that action to question the basic forbearance decision. MCI centrally maintains that section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1982), imposes an obligation on common carriers to file tariffs; the FCC, citing that central argument, insists that MCI, a party to the entire rulemaking proceeding, was "aggrieved" by the initial, 1982 forbearance decision and should have challenged the *Second Report*.

[3] This court dismissed an earlier petition for review as prematurely filed. MCI Telecommunications Corp. v. FCC, No. 84-1575 (D.C.Cir. Mar. 12, 1985).

That report, as we recounted earlier, provided for *permissive* forbearance limited to resellers of basic services. If the *Second Report* was not enough, then at least when forbearance was extended to MCI in the *Fourth Report*, the Commission contends, MCI should have petitioned for review. The *Fourth Report*, we have already observed, extended *permissive* forbearance to specialized common carriers, including MCI. We reject the Commission's door-closing argument as inconsistent with our precedent and with a sensible scheme of judicial review.

In a pathmarking decision on the timeliness of review applications, *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C.Cir.1958), *cert. denied*, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 60 (1959), this court stated:

> As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

Id. at 546. Recently, in *Montana v. Clark*, 749 F.2d 740 (D.C.Cir.1984), we reaffirmed "that an agency decision not to amend long-standing rules after a notice and comment period is reviewable agency action." *Id.* at 744. The district court in that case had erroneously read *Natural Resources Defense Council v. NRC*, 666 F.2d 595 (D.C.Cir.1981), as establishing a sweeping rule that all would-be petitioners must come to court at the moment a first cloud appears. We clarified in *Montana*:

To permit any complainant to restart the limitations period by petitioning for review of a rule, the *NRDC* court recognized, would eviscerate the congressional concern for finality embodied in time limitations on review.

This concern is not present in the instant case. Montana did not contrive to restart the 60-day period by unilaterally seeking repeal of a longstanding regulation. Indisputably, the agency itself initiated rulemaking procedures in 1981. It held out [an existing provision] as a proposed regulation, offered an explanation for its language, solicited comments on its substance, and responded to the comments in promulgating the regulation in its final form . . . . Unless we are to consider the notice and comment process a meaningless gesture, the [1982] order . . . reissuing [the existing provision] constitutes final agency action and is reviewable under the Administrative Procedure Act, 5 U.S.C. § 704.

749 F.2d at 744.

In this case, as in *Montana v. Clark*, the *agency* launched further rulemaking, solicited comments on the substance of a proposed rule, and responded to the comments in arriving at its final order. Rejecting a challenge to its statutory authority to eliminate common carrier tariff filing, the FCC fundamentally altered the forbearance program from a permissive to a mandatory arrangement. As MCI highlights, the permissive character of the earlier orders left carriers who wished to file tariffs free to do so and therefore at least arguably without cause for complaint. Only when the Commission turned permission into command did MCI's aggrievement become evident and plainly adequate to support a challenge to the Commission's forbearance authority.[4]

[4] While we do not reach the question whether MCI would have had standing to challenge the *Second* or *Fourth Report*, we note the Supreme Court's recent instruction in Heckler v. Chaney, —— U.S. ——, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985), that an agency's decision not to take enforcement action is presumed unreviewable under § 701(a)(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1982). In this case, the Commission justified its permissive orders in part as an allocation of enforcement resources. *See Further Notice*, 84 F.C.C.2d at 454-55. Thus, until forbearance was made mandatory, the FCC's activity was arguably immune from judicial review. *But cf. Chaney*, 105 S.Ct. at 1656 n. 4 (Court did not reach "situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities").

Disapproving similar FCC argument, this court recently stated:

> Although statutory time limitations on judicial review of agency action are jurisdictional, *see Nat'l Bank of Davis v. Office of Comptroller of Currency*, 725 F.2d 1390, 1391 n. 1 (D.C.Cir.1984) (*per curiam*), self-evidently the calendar does not run until the agency has decided a question in a manner that reasonably puts aggrieved parties on notice of the rule's content.
>
> . . . .
>
> . . . It would be patently unfair to hold that an agency's *entirely unspoken* (or impenetrably obscure) belief that Proposition B follows from Holding A may be the basis for precluding judicial review of Proposition B simply because the party aggrieved participated in the administrative proceeding that resulted in Holding A. Yet that is precisely what the FCC asks this court to do.

RCA Global Communications, Inc. v. FCC, 758 F.2d 722, 730-31 (D.C.Cir.1985). As in *RCA Global*, "we reject that effort," *id. at* 731, and now turn to the merits of MCI's contention that the Commission lacks statutory authority to prohibit common carrier tariff filings.

B. *Statutory Authority*

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980); *see National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1201 (D.C.Cir.1984) ("[T]he language of the statute [is] the proper starting point for both agencies and courts as they struggle to sort out the complex and often elusive responsibilities that Congress has delegated to them."). We therefore set out immediately the statutory provision on which MCI rests its case. Section 203(a) of the Communications Act provides:

> *Every* common carrier, except connecting carriers, *shall*, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(a) (1982) (emphasis added). "Shall," the Supreme Court has stated, "is the language of command," *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935); "[a]bsent a clearly expressed legislative intention to the contrary," courts ordinarily regard such statutory language as conclusive. *GTE Sylvania*, 447 U.S. at 108, 100 S.Ct. at 2056; *see, e.g., Amalgamated Transit Union v. Donovan*, 767 F.2d 939, 944 (D.C.Cir.1985).

The FCC counters with a further statutory provision, section 203(b)(2) of the Communications Act, 47 U.S.C. § 203(b)(2) (1982), and contends that its "plain meaning" permits the Commission to order the forbearance at issue. *See Sixth Report*, 57 RAD.REG.2d at 1398 (section 203(b)(2) "gives the Commission the express authority to exempt carriers from tariff filing requirements where appropriate"). Section 203(b)(2) provides:

> The Commission may, in its discretion and for good cause shown, *modify* any requirement made by or under the authority of this section either in *particular instances* or by general order applicable to *special circumstanuces or conditions* except that the Commission may not require the notice period . . . to be more than ninety days.

47 U.S.C. § 203(b)(2) (emphasis added).

The words "modify . . . in particular instances or by general order applicable to special circumstances or conditions" suggest circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement. *See, e.g.*, BLACK'S LAW DICTIONARY 905 (5th ed. 1979) ("modify" defined as "[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce"). Our resistance to the uncommon meaning the Commission currently reads into its "particular instances" and "special circumstances" modification authority is strengthened by precedent closely in point. We now review that precedent.

American Telephone & Telegraph Co. v. FCC, 572 F.2d 17 (2d Cir.) *(AT & T Resale), cert. denied*, 439 U.S. 875, 99 S.Ct. 213, 58 L.Ed.2d 190 (1978), involved a Commission conclusion that resellers of communications services were common carriers subject to regulation under the Communications Act. Prospective resellers challenged this determination. The challengers asserted that resellers were not common carriers; alternatively, they contended that the Commission had discretion to refrain from regulating resellers. The court upheld the Commission's ruling that resellers were common carriers subject to regulation, and then addressed the challengers' alternative contention:

> The FCC has a duty to "execute and enforce the provisions of" the Communications Act, 47 U.S.C. § 151. The Communications Act requires that com-

mon carriers furnish service on reasonable request, 47 U.S.C. § 201(a); that rates and practices be just U.S.C. § 201(a); that rates and practices be just, fair, reasonable and nondiscriminatory, 47 U.S.C. §§ 201 (b), 202(a); *that carriers file their tariffs with the FCC*, 47 U.S.C. § 203(a); that the FCC investigate complaints, 47 U.S.C. § 208; that carriers obtain certificates of public convenience and necessity before constructing, acquiring or operating any facilities or terminating any services, 47 U.S.C. § 214; that the FCC examine transactions that might affect rates or services, 47 U.S.C. § 215; and that carriers submit applications for proposed consolidations and mergers to the FCC, 47 U.S.C. § 222. *We are aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met.*

Id. at 25 (emphasis added). Even closer to home, in *American Telephone § Telegraph Co. v. FCC*, 487 F.2d 865 (2d Cir.1973) (*AT & T Special Permission*), the court addressed the limits of the Commission's discretion under section 203(b)(2):

> [W]e think that a proper interpretation of Section 203 (b) indicates that it does not authorize the Commission to circumvent statutory limitations upon its authority imposed by other sections of the Act. Since Section 203(b) only permits modification of "the requirements made by or under the authority of this section," the Commission may not rely upon this section to circumvent the requirements of Sections 204 and 205 relating to the limitation of the suspension period and the prescription procedure. In short, under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty days notice provision.

Id. at 879.

Counsel for the Commission conceded at oral argument that the FCC has arrived at its fully expanded view of section 203(b)(2) rather lately. By contrast, shortly after the Commission opened its *Competitive Carrier* inquiry, the agency stated in *Western Union Telegraph Co.*, 75 F.C.C.2d 461 (1980):

> There can be no question that tariffs are essential to the entire administrative scheme of the Act. They serve as a kind of "tripwire" enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby insure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act. The importance of tariffs and the requirement that common carriers—*all common carriers—must offer all of their communications services to the public through published tariffs* is well established. *See Armour Packing Company v. United States*, 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681 (1908).

Id. at 474 (emphasis added). Harmoniously, the FCC had informed the Second Circuit through the Commission's brief in *AT & T Resale*:

> As to the law, it is plainly wrong to suggest that the Commission could leave resale entities unregulated altogether. *The Commission has affirmative commands from Congress* to ensure that rates are just, reasonable and nondiscriminatory, Sections 201, 202; *that rates and practices are set forth in tariffs filed with the FCC, Section 203;* and that carriers obtain certificates of public convenience and necessity before obtaining facilities and putting them in operation, Section 214.
>
> *The agency has no authority to ignore these commands, even if market forces arguably are present which undercut the "natural monopoly" justification*

> *for regulation.* This much is clear from *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974), where the Supreme Court held that the FPC lacked the authority to leave natural gas rates entirely to the marketplace in abdication of its statutory responsibility to ensure that rates are just and reasonable.

Brief of Federal Communications Commission at 49-50, *AT & T Resale* (emphasis added), *quoted in* Reply Brief for Petitioner MCI Telecommunications Corporation at 12.

In short, at least until 1980, the Commission shared, indeed fostered, the judicial perception of the statutory tariff-filing requirement for common carriers. The requirement could be modified by administrative action, the FCC once understood, but not removed in gross by agency order. We hold that the Commission's prior comprehension of the meaning section 203 will bear was correct, and that the FCC's new view departs from any plausible reading of the statute's text.

As a second line of argument in support of the *Sixth Report*, the Commission asserts general authority to forbear from full Title II common carrier regulation in order to adapt its superintendence to changing circumstances as "the public interest" indicates. The FCC relies principally on four decisions to back up the asserted general authority; *Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir.1984); *Computer & Communications Industry Association v. FCC*, 693 F.2d 198 (D.C.Cir.1982), *cert. denied*, 461 U.S. 938, 103 S.Ct. 2109, 77 L.Ed.2d 313 (1983); *Western Union Telegraph Co. v. FCC*, 674 F.2d 160 (2d Cir.1982); and *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C.Cir.1966). These decisions lack the breadth that the FCC attributes to them. They provide no warrant for erasing the congressional instruction in section 203(a) that *every* common carrier *shall* file tariffs.

Wold Communications upheld the Commission's decision to allow the sale of certain discrete satellite transponders on a noncommon carrier basis. The FCC isolates and quotes this court's statement that "the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances." 735 F.2d at 1475. The "appropriate circumstances" in *Wold* included the Commission's representation that it had made "a modest adjustment" and had not "displaced regulated common carrier service as the dominant mode." *Id.* at 1468. The "limited departure from the status quo" approved in *Wold*, *id.* at 1469, concerned "noncommon carrier offerings," *id.* at 1474, and did not implicate, as this case does, "unfettered discretion to regulate or not [] regulate common carrier services." *Id.* at 1475 (quoting *Computer & Communications Industry Association*, 693 F.2d at 212).

Computer & Communications Industry Association held reasonable "[t]he Commission's finding that enhanced services and CPE [customer premises equipment] are not common carrier communications activities within Title II." 693 F.2d at 209. Similarly, *Western Union* upheld the Commission's decision to detariff terminal equipment, based on the FCC's reasonable conclusion that the sale or lease of that equipment was not a communications service. 674 F.2d at 165. *Philadelphia Television* also involved regulation—there of community antenna television (CATV)—of noncommon carrier activity:

> [The Commission's] holding that CATV systems are not common carriers thus comes before us in a context of regulation . . . under different provisions of the Communications Act. In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to *some leeway* in choosing which jurisdictional base and

> which regulatory tools will be most effective in advancing the Congressional objective.

359 F.2d at 284 (emphasis added).

In this case, the services provided by the non-dominant carriers remain common carrier services. Indeed, at an earlier stage of the *Competitive Carrier* rulemaking the Commission apparently rejected a definitional approach. *See Second Report*, 91 F.C.C.2d at 61-62 & n. 7. Therefore, decisions that depend on classification of the service or operation in question as outside the common carrier context will not travel the distance the Commission would take them.

Finally, the Commission urges that the *Sixth Report* orders an altogether rational regulatory reduction because "competitive marketplace forces in almost all cases will be sufficient to assure just and reasonable rates." Brief for Respondents at 51.

However reasonable the Commission's assessment, we are not at liberty to release the agency from the tie that binds it to the text Congress enacted. Significantly, the Commission's search for support leads it to decisions upholding the exemption of certain airline, railroad, and trucking services from tariff filing requirements—cases in which Congress had supplied explicit deregulatory authority.

In *Central & Southern Motor Freight Tariff Association v. United States*, 757 F.2d 301 (D.C.Cir.1985) (per curiam), for example, we upheld Interstate Commerce Commission orders exempting motor contract carriers of property from the tariff filing requirements of the Motor Carrier Act, 49 U.S.C. §§ 10,101-11,917 (1982). We relied on the

> sweeping text of the statutory exemption provisions. These provisions uniformly sanction relief "when relief is consistent with the public interest and the transportation policy of section 10101 of this title."

> The original provisions—whose substance continues in force despite the semantic changes wrought by the 1978 recodification—stressed the breadth of the Commission's discretion by stating that "the Commission may . . . grant such relief *to such extent and for such time, and in such manner as in its judgment* is consistent with the public interest and the [national transportation] policy." What we have, to use the Fifth Circuit's words, is a congressional charge to "go forth and do good." The delegation to the Commission is as broad as Congress could make without giving the Commission carte blanche.

Id. at 314-15 (footnotes omitted).

Similarly, *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819 (D.C.Cir.1980), upheld detariffing domestic air cargo carriers based on sweeping changes Congress made in the regulatory regime:

> Section 416(b) and 418(c) grant the Board very broad discretion. The latter authorizes the Board to exempt all-cargo carriers from "*any* * * * section of this chapter which the Board by rule determines appropriate * * *." 49 U.S.C. § 1388(c) (Supp. I 1977) (emphasis added). The former permits the Board to exempt "any person or class of persons" from "*the requirements of this title* or *any* provision thereof * * * if it finds that the exemption is consistent with the public interest." Pub.L. No. 95-504 § 31(a) (emphasis added). Thus, as petitioners concede, the plain language of the statute authorizes the Board's action.

Id. at 827.

Brae Corp. v. United States, 740 F.2d 1023 (D.C.Cir. 1984) (per curiam), *cert. denied*, —— U.S. ——, 105 S.Ct. 2149, 85 L.Ed.2d 505 (1985), upheld deregulation of freight boxcar rates. In the Staggers Act, Congress stated:

> In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission *shall* exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
>
> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10,505(a) (1982) (emphasis added). We sought to follow the congressional lead:

> Congress itself has found that the structure of the transportation industry has changed so that "many of the Government regulations affecting railroads have become unnecessary and inefficient," . . . and has furthermore commanded the Commission to remove by exemption "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers." . . . Given that explicit congressional mandate, we do not believe the Commission need as exhaustively review and explain away its original justifications for abandoned regulations as if it were operating under the same statute it always had.

740 F.2d at 1038.

Perhaps most tellingly, Congress has armed the FCC, in the Record Carrier Competition Act of 1981, Pub.L. No. 97-130, § 2, 95 Stat. 1687, with authority of the kind the Commission would exercise here without statutory change. In the Record Carrier legislation Congress instructed:

> The Commission shall to the *maximum extent feasible*, promote the development of fully competitive domestic and international markets in the provision of record communications service, so that the public may obtain record communications service and facilities (including terminal equipment) the variety and price of which are governed by competition. In order to meet the purposes of this section, the Commission *shall* forbear from exercising its authority under [Title II of the Communications Act] as the development of competition among record carriers reduces the degree of regulation necessary to protect the public.

47 U.S.C. § 222(b)(1) (1982) (emphasis added); *see RCA Global Communications, Inc. v. FCC*, 758 F.2d 722 (D.C.Cir.1985).

But Congress has not given the FCC new instruction for the case at hand. As the Second Circuit stated in *AT & T Special Permission*:

> In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.

487 F.2d at 880 (footnote omitted). In sum, if the Commission is to have authority to command that common carriers not file tariffs, the authorization must come from Congress, not from this court or from the Commission's own conception of how the statute should be rewritten in light of changed circumstances.

CONCLUSION

For the reasons stated, we vacate the Commission's decision prohibiting common carriers from filing tariffs. In so ruling, we do not reach the question whether the the FCC's earlier permissive orders are invalid.[5] We note that the Commission could further streamline the regulation of non-dominant carriers without encountering any contrary congressional prescription. *See Sixth Report*, 57 RAD.REG.2d at 1395-96. But to proceed in the manner ordered by the *Sixth Report*, the Commission, in our view, must obtain leave of Congress. We may interpret the FCC's authority generously, but we are not positioned to confer upon the agency "unfettered discretion to regulate or not regulate common carrier services." *Computer & Communications Industry Association*, 693 F.2d at 212.

The order under review is vacated and the case is remanded to the Commission for further consideration and action consistent with this opinion.

It is so ordered.

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[5] *See supra* note 4.